DEC 5 1957

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1955

No. 722 Misc.

No. 12, 317

Lolita Lebron, Petitioner
v.
United States of America, Respondent

No. 12, 318

Rafael Cancel Miranda, Petitioner
v.
United States of America, Respondent

No. 12, 319

Andres Figueroa Cordero, Petitioner
v.
United States of America, Respondent

No. 12, 320

Irving Flores Rodriguez, Petitioner
v.
United States of America, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS WITHOUT PREPAYMENT OF COSTS

Come now Petitioners herein by their attorney, Ben Paul Noble, and move this Honorable Court for leave to proceed in forma pauperis on this appeal and in this application for Petition for Writ of Certiorari and as reason therefor submit the following:

1. Affidavit of Counsel
2. Rule 53; Rules of the Supreme Court of the United States

Ben Paul Noble
1124 Warner Building
Washington, D. C.

Sterling 3-4377

POINTS AND AUTHORITIES IN SUPPORT OF MOTION

Title 28, U.S.C.A. Sec. 1915

DeMaurez v. Swope, 100 F.2d 530

Woods v. Bailey, 122 F. 967

Rasmussen vs. Ragen, 146 F.2d 516

U. S. ex rel. McNeill v. Avis, 108 F.2d 457

Ben Paul Noble

CERTIFICATE OF SERVICE

I certify that copy of the foregoing Motion, together with Affidavit in support thereof was served by mailing, postage prepaid, first class mail, 3 copies thereof to the Solicitor General of the United States, Department of Justice, Washington, D. C., and three copies to the U. S. Attorney for the District of Columbia, U. S. Court House, Washington, D. C., on this 27th day of April, 1956.

Ben Paul Noble

APR 2 1 1956
HAROLD B. WILLEY, Clerk

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Of Counsel

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

Your Petitioners, by counsel appointed in the trial court, respectfully pray for a Writ of Certiorari directed to the United States Court of Appeals for the District of Columbia Circuit to review a judgment of that Court affirming a judgment of the United

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States District Court for the District of Columbia finding the Petitioners, Rafael Cancel Miranda, Andres Figueroa Cordero, and Irving Flores Rodriguez, guilty on all ten counts of an indictment charging them each with five counts of assault with a dangerous weapon and five counts of assault with intent to kill; and finding the Petitioner, Lolita Lebron, guilty on the five counts of that indictment charging her with assault with a dangerous weapon.

(a) OFFICIAL REPORTS

The Opinion of the Court of Appeals is reported in the United States Court of Appeals for the District of Columbia Circuit, cases numbered 12, 317 through 12, 320, decided by that Court on October 13, 1955 and in 229 F. 2d 16. An official copy of the Opinion is attached hereto as Appendix A.

The District Court rendered no written opinion.

(b) JURISDICTION

The jurisdiction of this Court is invoked on the following counts:

(i) The date of the judgment of the Court of Appeals sought to be reviewed is October 13, 1955.

(ii) A Petition for Rehearing was denied by the Court of Appeals on February 24, 1956, and the date within which to petition for certiorari to this Court was extended by this Court to April 5, 1956 and on that date again extended by this Court until April 24, 1956.

(iii) The statutory provision conferring jurisdiction on this Court to review the judgment in question is Title 11, Section 101 of the District of Columbia Code; also 31 Stat. 1190, Ch. 854, Sec. 2.

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(c) THE QUESTIONS PRESENTED FOR REVIEW

1. Whether an accused granted leave in the trial court to proceed in forma pauperis, on Motion duly made before trial by counsel appointed for the defense, is entitled to a reasonable investigation at the expense of the Government upon a showing that facts incidental and necessary to the defense cannot otherwise be ascertained by counsel.

2. Whether indigent persons, jointly accused of crimes growing out of the same act, for whom the trial court has appointed counsel, are entitled to separate and independent representation; and whether, on Motion duly made at the conclusion of the Government's case for the withdrawal of a juror and the declaration of a mistrial, it being then apparent that each Defendant may have a separate and possibly inconsistent defense, such Motion should have been construed by the court as a Motion for Severance of Counsel.

3. Whether the applicable statute (18 U. S. C. Section 4244) required the trial court under the facts of this case to grant a motion made during presentation of the Government's case-in-chief and repeated thereafter during the trial and on motions made subsequent to the verdict for a mental examination of the Defendants should have been granted; and whether the Court of Appeals erred in sustaining the trial court's exclusion of questions relating to the mental condition of the accused during the cross examination of Government witnesses.

4. Whether the testimony adduced from lay witnesses and from the Defendants themselves in this case was sufficient to indicate some evidence of mental illness, shifting the burden of prooving the sanity of the accused to the Government.

5. Whether the exclusion by the trial court of an entire line of questioning on direct examination of the accused concerning the nature of their relationship with the Nationalist Movement in Puerto Rico, their background and emotions before and at the time of the act denied

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the Defendants of due process of law and a fair and impartial trial by eliminating insanity in the form of an "irresistible impulse" as a defense.

6. Whether Defendants' Motion for a New Trial, argued July 6, 1954, should have been granted by the trial court in the light of an Opinion entered by the Circuit Court of Appeals on July 1, 1954, radically changing the applicable law governing controlling issues in the case since sentence, concluding the trial, was not imposed until July 8, 1954.

7. Whether under the peculiar circumstances of this case the exclusion by the trial court of all questions concerning the motive of the accused calculated to negate the inference of intent to be drawn from the act itself and the surrounding circumstances, was reversible error.

8. Whether the trial court erred in denying Defense's motion when the Government rested its case and repeated at the conclusion of all of the evidence, for a judgment of acquittal of each Defendant on the five counts of the indictment charging assault with a dangerous weapon, those being lesser offenses included in the greater crime charged.

9. Whether the trial court's instruction to the jury when considered as a whole was so confusing and contradictory as to have denied the Defendants of a fair and impartial trial; whether Defense prayers refused by the trial court should have been granted; and whether specific instructions given improperly or inadequately stated the applicable law.

10. Whether the trial court erred in further instructing the jury after it had retired to deliberate and giving the jury at that time additional instructions not specifically requested.

11. Whether the trial court erred in accepting a "piece-meal" or partial verdict from the jury during the course of its deliberations.

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(d) REASONS RELIED ON FOR ALLOW. NCE OF THE WRIT

1. The Court of Appeals erred in affirming the trial court's denial of a pretrial motion made in behalf of Defendants for leave to proceed with a reasonable and limited investigation into the background and habitat of the accused for the purpose of determining whether insanity (irresistible impulse) was an available defense.

This is a novel question which has not been but should be determined by this Court.

2. The Court of Appeals erred in sustaining the trial court's refusal to grant a motion made at the close of the Government's case-in-chief for the withdrawal of a juror and declaration of mistrial.

Here again, a novel question in Federal jurisprudence is presented which should be finally determined by this Court.

3. The trial court's denial of Defense motions made during the course of the trial for a mental examination of the accused was flagrant error in the fact of the statute and controlling decisions of the Court of Appeals. In addition, the exclusion by the trial court of an entire line of questioning intended to develop evidence of the Defendants' mental condition at the time of the act and immediately thereafter, was erroneous.

4. The Court of Appeals erred in sustaining the trial court's finding that no evidence of mental illness sufficient to chift the burden of prooving the sanity of the accused to the Government was apparent from the evidence in this case.

5. The trial court erred in excluding all questions relating to the background, motive, habitat and emotions of the accused since the exclusion of these areas precluded absolutely an argument to the jury that the Defendants were insane because irresistably driven to do what they did, knowing it wrong.

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6. The applicable law governing the issue of insanity was radically changed by the Appellate Court before the imposition of sentence and the question whether a motion for a new trial argued subsequent to the Appellate decision and prior to the imposition of sentence was erroneously denied in the lower court, depriving these Defendants of due process of law and a fair and impartial trial.

7. The Court of Appeals sustained the exclusion by the trial court of an entire line of questioning calculated to develop the motive of the accused and intended to negate the inference of an intent to kill which, under the peculiar circumstances of this case, was inferred by the jury from the act itself and the surrounding circumstances.

This presents a novel question in Federal jurisprudence which should be and has not been determined by this Court.

8. The trial court erroneously denied Defense motions for judgment of acquittal of each Defendant on the counts in the indictment charging them with assault with a dangerous weapon since those counts merged into the counts charging the greater offense.

9. Contrary to prevailing law in other Federal jurisdictions, and rulings of this Court, the trial court refused to grant prayers for instructions submitted by the Defense; so instructed the jury as to confuse it and improperly and inadequately stated the applicable law.

10. The trial court erroneously granted the jury's request for further instructions and "further instructed the jury" beyond the specific request made, constituting reversible error and presenting a novel question in Federal jurisprudence which should be determined by this Court.

11. The "extrication" of a verdict from a jury by the trial court, "piece-meal" during the course of its deliberation denied the accused of a fair and impartial trial and presents a Federal question which has not been determined in this jurisdiction.

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12. The international implications involved in the trial of the accused below should have persuaded the trial judge, out of an abundance of caution and consciousness of its significance among our neighbors in Latin America, to have avoided the unnecessary limitations placed upon the Defense at the trial.

13. The questions of law urged on appeal and not considered by the Court of Appeals in its opinion are important Federal questions which should be decided by this Court.

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(e) STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C.A., Section 4244 (Act of September 7, 1949, Public Law No. 285, 81st Cong., 1st Sess., 63 Stat. 686

> "To Provide for the Care and Custody of Insane Persons Charged With or Convicted of Offenses against the United States . . ."
>
> "Whenever after arrest and prior to the imposition of sentence . . . the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon a similar motion, the court shall cause the accused . . . to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. . . ."

Title 22 - Section 501, District of Columbia Code

> " Assault with Intent to Kill, Rob, Rape, or Poison. "
>
> "Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink or medicine with intent to kill or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not more than fifteen years. "

Title 22, Section 105, District of Columbia Code.

"Persons Advising, Inciting, or Conniving at Criminal Offense to be Charged as Principals."

"In prosecutions for any criminal offense all persons advising, inciting or conniving at the offense or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this Section being that as to all accessories before the fact, the law heretofore applicable in cases of misdemeanor only shall apply to all crimes whatever the punishment may be."

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(f) CONCISE STATEMENT OF THE CASE

1. Leave to Investigate

The four Defendants below were indicted on March 3, 1954 by a single indictment charging each of them with five counts of assault with intent to kill and five counts of assault with a dangerous weapon. In each count of the ten count indictment, the four Defendants were jointly charged with an assault upon the person of one of the five members of Congress (Alvin M. Bentley, Clifford Davis, Ben F. Jensen, George H. Fallon, Kenneth A. Roberts) struck by bullets fired in the frenzied demonstration admittedly conducted on March 1, 1954, by the accused in the public gallery of the House of Representatives.

In Count I of that indictment, each of the Defendants was accused with having assaulted Congressman Bentley with an intent to kill him, and, in Count VI of the indictment each Defendant was charged with having assaulted that same Congressman with a dangerous weapon. In Count II of the indictment, each Defendant was charged with having assaulted Congressman Davis with intent to kill him, and in Count VII each with having assaulted that Congressman with a dangerous weapon. In Counts III and VIII, Congressman Jensen was the victim named; IV and IX, Congressman Fallon, and V and X, Congressman Roberts.

Defendants were arraigned on March 5, 1954, pleaded "not guilty" to the charges, and the Court appointed F. Joseph Donaghue, Chief Counsel; Myron Ehrlich, Ben Paul Noble and Abraham Goldstein Associate Counsel, to represent the Defendants.

On March 30, 1954, a Motion was filed on behalf of each Defendant for leave to proceed at Government expense with investigation. This Motion was argued before the Court on April 15, 1954.

2. Severance of Counsel

At the conclusion of the Government's case-in-chief, Associate Counsel moved the Court for the withdrawal of a juror and declaration of a mistrial for the reason that the Defendants for whom counsel

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had been appointed were entitled to separate and independent representation, especially when it appeared to the Court and to counsel, that the possibility of separate, independent and possibly inconsistent defenses had arisen during the presentation by the Government of its case.

The Government's evidence had indicated that the woman Defendant was hysterical, that some of the male Defendants were abnormally calm, that some of the accused had fired into the ceiling, and that at least one of the accused's gun had jammed. The Motion was denied by the trial judge.

3. Mental Examination

The Court of Appeals sustained the trial court's denial of motions made by Defense counsel during the course of the trial. In its Opinion, (Appendix A, pp. 3 and 4, 229 F. 2d 18,19) the Appellate Court stated that an attempt to invoke the applicable statute was made at the close of Defendants' evidence.

However, it is submitted that that attempt was first made during a bench conference, even before the Government had concluded its case-in-chief. (TR. 747, 752)

During this conference one of the Associate Counsel discussed at great length the Tatum Case and its application to the facts as developed to that point in this case.

> "Now if these people . . . to any unpracticed mind, I assure you . . . did a thing like they did in the Capitol, I am beginning to believe that there is something wrong with them."
>
> ". . . I feel that under the Tatum Case, if these people were nervous and acted in a peculiar manner, and they take the stand and say something like that, that we have to raise the point."
>
> "Well, there was this indication by the officer that she was nervous and so forth . . . "
>
> "I would like to ask this witness, as well as other witnesses, regarding the condition of the Defendants with reference to nervousness, physical expressions, and so forth, for the purpose that if the evidence continues to show or does show that there may have been something wrong with the Defendants mentally that that sort of instruction ought to be given the jury."

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> The Court: "Yes, well I will permit you to ask one question of each witness but I am not going to let you ask a series of questions of each witness as to whether he noticed their physical expression, at this point, at that point or the other point." (TR. 749, 750)

The United States Attorney urged to the Court, after the Government rested its case, that because the Government had the Defendants examined between March 1 and 3rd by psychiatrists and those examinations reflected the sanity of the accused, the Court should not grant the Defense motion made at the conclusion of the Government's case-in-chief for a mental examination. (TR. 916)

It is pointed out that during that short interval of time which elapsed between the Defendants' arrest and the appointment by the Court of defense counsel, those psychiatric examinations referred to by the United States Attorney were conducted and Petitioners submit that the evidence from the record clearly indicates that during this same short interval of time, the accused were being constantly interviewed and examined by police officers and other investigative agents and that even those reports submitted to the trial court (TR. 927) indicated but brief examinations by psychiatrists. Lolita Lebron was only examined once and by one of the psychiatrists referred to; the male Defendants briefly twice by two psychiatrists.

> "A third issue, that of her sanity, I shall rule that there is no such issue in this case." (TR. 953)

> "To my mind this woman's testimony about coming to Washington and expecting to be killed and all the other things that she said indicate to me that there is probably something wrong with her mentally and we should like the opportunity to ask further questions for the purpose of drawing her mental condition to the attention of the jury." (TR. 953)

> "No, I will not permit that testimony, I am not going to submit the issues of insanity to the jury in the absence of at least some medical testimony, because I don't think a jury of laymen is competent . . . to find a person insane without the aid of some medical testimony . . . I will not permit the jury to speculate that merely because the motive of a crime is bizarre that individual . . ." (TR. 1011)

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"We feel and we feel very seriously that the action that was committed by these people under the circumstances in which they committed it, taken together with their background and their states of mind, tend to show . . . that they were unstable to the point of being insane." (TR. 1084)

"Well, we feel sincerely . . . that these people, . . . that there is something mentally wrong with them" (TR. 1087)

"Well, I am not going to submit the issue of sanity to the jury without even a modicum of medical testimony and with the expression even of lay opinion that they were abnormal." (TR. 1088)

"We are again asking the Court at this time to have these people examined by psychiatrists other than those whom Mr. Rover had examine them, Because of the conversation, the testimony on the witness stand, and what the testimony was, their lack of remorse, their peculiar attitude toward this entire situation, that I am firmly convinced there is strong possibility that these people are mentally unstable." (TR. 1159, 1160)

From the above excerpts from the Transcript of the record, it is apparent that the trial court excluded an entire line of questioning because of its own firm conviction that sanity as a defense could not be raised without medical testimony.

4. Burden of Proof (Sanity)

Testimony of lay witnesses on cross examination by the Defense at the trial and of the Defendants themselves was sufficient to rebut the presumption of sanity and shifted the burden of prooving that element to the Government.

Government Exhibit #11:

"Before God and the world my blood claims for the independence of Puerto Rico; my life I give for the freedom of my country. This is a cry for victory in our struggle for independence which more than half of a century has tried to conquer the land that belongs to the Puerta Ricans. I state forever that the United States of America are betraying the sacred principles of mankind in their continuous subjugation of my country violating our rights to be a free nation and free people. And their barbaric tortures to our apostle of independence, Don Pedro Abezie Campos,

Lolita Lebron

"I am the responsible for all"

The above Exhibit read into the record (TR. 508) is a handwritten note signed by Lolita Lebron and found in her pocket book after her arrest. This note, taken together with those portions of the record stated above,

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are sufficient for the purposes of the argument in connection with this point under the appropriate heading.

The Court of Appeals erroneously denied Defendants' prayer for instruction No. 16 (TR. 1206).

5. Irresistible Impulse

Upon direct examination by counsel of the accused, the Court on numerous occasions, excluded questions asked of the Defendants concerning their relationship with the Nationalist Movement in Puerto Rico, and emotions before and at the time of the act, their background and habits.

> "I am not going to permit this trial to go into these side issues" (TR. 950)
>
> "It is important in her defense to understand what was in her mind in consequence of which she went there and committed the act." (TR. 951)
>
> "I am going to exclude that and I am not going to permit this case to wander into the field of Puerta Rican politics." (TR. 952)
>
> "Now I am going to exclude all questions relating to motive" (TR. 954)
>
> "I feel that the background of these Defendants . . . the emotional history growing out of their attachment to the Nationalist Movement, its inbred inculcation in their minds, and their attitudes may have determined why they did what they did . . . these Defendants . . . inculcated with the doctrines of the Nationalist Movement were not actually sane when they came to Washington. ." (TR. 1005)
>
> "There has been no evidence of insanity gentlemen" (TR. 1005)
>
> ". . . Therefore I shall exclude this line of questioning and your objection to my ruling is noted." (TR. 1008)
>
> "If we can show by these witnesses' conduct and background what their state of mind might or might not have been - whether or not they were insane at the time - " (TR. 1011)
>
> "With reference to insanity . . . the theory of irresistible impulse which involves emotion and background . . ." (TR. 1011)
>
> "I exclude all questions relating to background and patriotic motive" Ibid.
>
> "I am excluding all testimony as to the Defendants' family background and past activities, and evidence of their alleged patriotic motives". Ibid.
>
> "Whether a Defendant charged with a crime knew that it was wrong is immaterial because he is responsible for the crime if he has committed it." (TR. 1031)

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"Well, if your Honor please, I believe that when Mr. Rover asked this witness two questions on cross examination, leading toward the motive, the door was opened for some additional questions." (TR. 1062)

"At this time may we note for the record our objection to your Honor's refusal to permit the questions which we think have some bearing on the sanity of the accused." (TR. 1063)

"The only way in which we can show their state of mind is to show it by their own testimony." (TR. 1087)

" Q. Did you feel what you were doing was wrong?"

"The Court: 'Exclude that' (TR. 1090)

The trial court erroneously denied Defense's prayers No. 18 and 19 on the governing law as it related to the defense of Irresistible Impulse. (TR. 1204, 1205)

6. The Durham Case

The last segment of a "piece-meal" verdict was returned to the Court by the jury on June 17, 1954. Thereafter, on July 1, 1954, the controlling Court of Appeals, in Durham vs. U. S., 214 F. 2d 862 radically changed the law of sanity in the District of Columbia, eliminated the right-wrong test and irresistible impulse and undertook to establish new standards. Thereafter, on July 6, 1954, Defendants' Motion for a New Trial was heard, argued and denied by the trial court. The Defendants below were not sentenced by the Court until July 8, 1954 and judgment was not entered until July 12.

In its Prayer No. 17, the Defense, arguing in support thereof, the Court having denied it, urged the same contentions and cited the same cases utilized by the Court of Appeals in the Durham Case, supra. (TR. 1204, 1205)

These same arguments were repeated and amplified during the argument for Motion for a New Trial.

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" Q. Did you feel what you were doing was wrong?"

"The Court: 'Exclude that' (TR. 1090)

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7. Motive in Negation of Intent Inferred from Acts and Circumstances

The Court of Appeals in its opinion (Appendix A, pp. 7, 8, 229 F. 2d 20) refers to a statement made in Collazo vs. U. S., 196 F. 2d 573 and stated:

> "The male appellants were allowed to testify that they did not intend to kill the particular legislators who were shot - that they had no personal animosity toward them; they said, however, that they intended to kill members of Congress in order to draw attention to the alleged wrongs of Puerto Rico. Moreover, Defense counsel overlooked the fact that the law sharply limits the relevancy and materiality of motives in cases such as this."

Various Government witnesses testified as follows during the Government's case-in-chief:

> "To bring attention of American people to Puerto Rico's desire for independence. He denied firing any shots." (TR. 605)
>
> "I removed the empty cartridges jammed in barrel of the gun." (TR. 759)
>
> "She said she had come to Washington that day in order to stage a demonstration that would bring to the attention of the people of the United States the cause of Puerto Rican freedom" (TR. 769)
>
> "I did a lot of meditating on Washington's birthday, about how he worked to liberate his country, I have a great admiration for him for the way he liberated his country. Thinking about this and my great desire for my country's freedom, that is the reason I came here to Wash...." (TR. 770)
>
> "I, (Miranda) came for a patriotic demonstration for the freedom of Puerto Rico." (TR. 784)
>
> "He, (Cordero) had trouble with his gun, a misfire or something . . ." (TR. 825)
>
> "He, (Cordero) stated that he had come together with them to make a demonstration for the freedom of his country, Puerto Rico." (TR. 827

And on direct examination the record reveals the following:

> "Q. Any intention or purpose of killing anyone?"
> "A. No." (Lebron) (TR. 941)
>
> "Now I am going to exclude all questions relating to motives." (TR. 954, also see pp. 1005, 1007, 1011, 1031, 1052, 1063, 1080, 1084, 1083, 1090, 1102, 1108, 1121, 1126, 1146)

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The trial court denied Defense's Prayer No. 8, 9 and 10 (TR. 1200) 14 and 15 (TR. 1204) and the court went on to charge the jury in part as follows: (TR. 1261)

> "That, under this indictment, any or all of the Defendants may be found guilty of assault with intent to kill or of assault with a deadly weapon, or both; or not guilty."

And then: (TR. 1269)

> "To discharge a firearm into a group of people constitutes an assault even though there is no particular intent to hit any particular person within the group."

Also see TR. 1173.

8. Merger of Lesser Offense into Greater Crime Charged

When the Government rested its case, counsel for the defense moved for a judgment of acquittal (TR. 893) and this motion was renewed at the conclusion of the evidence. (TR. 1188)

During the argument on the motion midway in the trial, the record will reveal the following:

> "Your Honor is fully familiar with the science of ballistics . . ." (TR. 893)
>
> ". . . Government has not identified any particular slug or bullett as having come from any particular weapon." (TR. 893)
>
> ". . . pistol jammed ceases to be a dangerous weapon." (Tr. 894)

9. The Instructions

The trial court began instructing the jury at 3:15 P. M. on June 16, 1954 (TR. 1284) after denying Defendants' Prayers for Instruction No. 5 (TR. 1229); No. 6 (TR. 1[illegible], No. 7 (TR. 1199) and No. 11 (TR. 1200).

10. Further Instructions

The trial court granted the jury's request for "further instructions" several times during the course of its deliberations. (TR. 1234 - 1295; 1313 - 1320)

> "Is the act of pointing a dangerous weapon, namely, a firearm, into a crowd of people, and shooting it into a crowd of people, is that an intent to kill?"

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11. Piece-meal or Partial Verdict

The jury retired to deliberate the case on June 16, 1954. At 5:35 P. M. on that date the Court received, over the objection of counsel, the verdict of the jury finding all four of the Defendants guilty on counts 6, 7, 8, 9 and 10 of the indictment. Immediately thereafter the jury resumed its deliberations as to all Defendants on the first five counts and at about 11:00 P. M. the court again received a "piece-meal" or partial verdict finding the male Defendants guilty on these counts. Then at 11:20 P. M. the jury retired for the evening.

On June 17, 1954, at 5:30 P. M. the jury returned its verdict of not guilty as to the remaining Defendant, Lolita Lebron, on the first five counts of the indictment.

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(g) ARGUMENT AMPLIFYING THE RE SONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. Leave to Investigate

The Petitioners are indigent, Puerto Rican Nationalists, who had never resided in the District of Columbia and whose affiliations, social and otherwise, were either in New York City or in Puerto Rica.

Two of the male Defendants, Cordero and Rodriguez neither spoke nor understood the English tongue.

Your counsel, urging this appeal, conferred with the accused numerous times during preparation for the trial. Chief Counsel appointed by the court participated in very few of those conversations. An appointed interpreter assisted at the interviews.

From the outset, counsel felt that certainly the Defendant Lolita Lebron and possibly the three male Defendants were so emotionally unstable because of their enduring and fanatical attachment to the minority Nationalist Movement in Puerto Rico and in this country as to warrant an investigation by a competent psychiatrist for the purpose of determining whether the defense of insanity and particularly "irresistible impulse" (a legal defense at the time of the investigation) should be pleaded. Since all of the Defendants steadfastly and continuously refused to submit to a psychiatric examination for the reason that they felt the defenses inherent therein might detract from the spirit of martyrdom that had persuaded the overt act with which they were charged, appointed counsel were placed in the untenable position of being obligated to defend uncooperative clients, who cut off what counsel believed to be their main defense. Under other circumstances, counsel would have withdrawn from the case at this point, but having been appointed by the Court, felt a duty to proceed despite their clients' attitude and generally uncooperative spirit.

The Court must bear in mind that at the time these accused were awaiting trial, the Press so generally ascribed fanaticism to the entire

Puerto Rican Nationalist Movement that the mere commission of the heinious act itself by these accused, without provocation or malicious motive, was sufficient to raise a strong presumption, at least in the minds of the Defense counsel, who were seeking through interviews to analyze the Defendants and prepare their legal defense, that their clients were mentally ill.

In this atmosphere, a Motion for Leave to Investigate was filed and argued. (TR. 1 - 9)

Counsel argued, "at the time they shot, they may have been of unsound mind;" "you can't set out grounds if you don't know the background;" "I think the act itself a sufficient prima facie showing;" "maybe their fanaticism was caused by a mental disease." (pp. 5 and 6)

In denying the motion the Court said: "If you can present evidence to warrant the authorization you may renew the motion."

The Court of Appeals (App. A., p. 6, 229 F. 2d 19) sustained this ruling and dismissed the contention on appeal with the statement that no authority is cited and none known.

Petitioners concede the absence of authority in Federal jurisprudence, but urge in support of this Petition that under circumstances such as here existed, a trial court should, in its discretion, allow reasonable though limited investigation to be conducted by appointed counsel at the expense of the Government.

In the instant case, counsel were confronted with the anomaly that required them to accept the accused persons' convictions of their own sanity despite personal persuasion to the contrary. A reasonable and limited investigation conducted in the city of New York and possibly, although not necessarily, in Puerto Rico, would have eliminated those doubts, if indeed, it would not have disclosed personality traits, psychopathic behavior, and possibly medical evidence sufficient to have justified a motion, supported by affidavit of counsel, for a mental examination under the statute.

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Conceding that "fishing expeditions" at Government expense in criminal cases should not be judicially sanctioned, nevertheless, reasonable investigation is certainly justified in pauper cases under circumstances such as were here present, and the trial court should be vested with the discretion to authorize and limit the scope of such investigation.

Under certain circumstances such as here existed, the denial by the trial court of leave to proceed with reasonable investigation at Government expense, deprives [illegible] of his right to enjoy a speedy and public trial; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense, all preserved to an accused by the Sixth Amendment.

Petitioners further submit that the denial of such a motion in these circumstances is a denial of "due process of law" as guaranteed by the Fifth Amendment.

2. Severance of Counsel

The Court of Appeals in its opinion (Appendix A, p. 7, 229 F. 2d 19, 20) would appear to have relied heavily upon the statement of Chief Counsel made subsequent to the Motion for the Withdrawal of a Juror and Declaration of a Mistrial, made by an Associate Counsel, in sustaining the trial court's denial of [illegible] motion.

Here again, Petitioners urge that where substantive rights are involved, neither the opinions of counsel, especially appointed by the Court, nor the emotions of indigent, ignorant accused should control the application of principles giving rise to those rights.

As the Court of Appeals pointed out, Petitioners were not entitled to be represented by separate counsel unless there was some inconsistency in joint representation. When such inconsistency becomes apparent either to appointed counsel or to the Court itself, a severance should be ordered. Powell vs. State of Alabama, [illegible] S. Ct. 55.

At the time the motion was made, the case was postured in

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inconsistency as is apparent from the following excerpts from the record:

"I saw four people, three men and a woman, the woman had a flag she was trying to unfurl, she was screaming" (TR. 125)

"Isn't it a fact that she was jumping up and down, waving the flag with one hand, shooting a gun with the other and creating quite a commotion?"

"A. Yes." (TR. 145)

"I don't think she hit anything unless she hit the ceiling." (TR. 162)

"The gun was pointed toward the ceiling, in her hand." (TR. 187)

". . . throwing up her arm, shooting up in the air." (TR. 233)

"heard screaming - woman" (TR. 249

"A plainclothes man took loaded clip from his pistol" (TR. 250) (Emphasis supplied and please note that Congressman Van Zant was here referring to the Defendant, Miranda.)

"First shot knocked plaster from ceiling" (TR. 257)

"The leader was screaming" (TR. 369)

"She said: 'We're here for our country, Puerto Rica is not truly free, we want independence'" (TR. 411)

"She was shaking and she was holloring, . . ." (TR. 471)

"Exhibits 8a and 9a were in the gun - four live bullets in the long barreled gun." (TR. 514)

"Fifth bullet hung in the chamber of the gun." (TR. 521) (long barreled gun)

"He was nervous - hands shaking - quivering . . ." (TR. 570, 571)

"I took the pistol by the barrel - I don't believe it was hot." (TR. 664)

"The leader was jumping and waving a flag." (TR. 672)

"He was pretty calm, yes." (TR. 745) (Witness referring to Miranda)

"I removed the empty cartridge jammed in the barrel of the gun." (TR. 759)

"Yes Sir, it was jammed." (TR. 760)

". . . there was a slug imbedded in the door to the entrance to gallery #4." (TR. 795)

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Thus from all of the testimony of Government witnesses to the actions of Defendants during the "demonstrations" on fateful March 1, 1954, it appears not only from the above excerpts from the transcript but from a reading of the whole of the Government's evidence produced prior to the motion in question, that the attention of all of the witnesses to the action was attracted in the main to the movement of the woman Defendant, Lebron. There is little of clarity in the record concerning what the male Defendants were doing and slight reference if any to the direction of their fire. Certainly, taken as a whole, the evidence is vague, inconsistent and confusing as to how many guns were fired, by whom, and in what direction.

The admissions of the Defendants themselves made after their arrest to police officers and to Harry H. Hastings, a special agent in the United States Secret Service, would appear to be the only evidentiary material available to the jury at this point on the questions here involved.

To Mr. Hastings, Cordero stated that he was unable to fire his gun which was jammed (TR. 825) and Rodriguez to the same agent stated that he also had trouble with his gun. (TR. 835)

Petitioners submit that the crime of assault with intent to kill, because it involves proof of specific intent, made it incumbent upon the Government to prove that an intent to kill was conceived: either in New York at the time the demonstration was planned; between that time and the time the demonstration began on March 1 in the House Gallery; or during the frenzied course of the demonstration itself. In addition, the Government had the burden at the trial, of proving that each Defendant had such intent or joined in the criminal actions of others, knowing those others had that intent.

Since intent in any case is an inferential matter to be derived from all of the acts, conduct and circumstances surrounding the alleged crime, it is argued that the discrepancy and confusion concerning those

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inferential elements at the time this motion was made, unquestionably revealed to a sufficient degree the inconsistency required before such a motion can be granted. Indeed, it is urged, the Court, in an abundance of caution, should have severed counsel at this point on its own motion in an effort to provide every constitutional safeguard for the martyr-bent accused. Assuming without conceding, arguendo, that one or more of the Defendants had an intent to kill, inferentially proved beyond any reasonable doubt, should not the Court at this juncture have made available to the others, the opportunity of negating the application of those inferences to them!.

Petitioners submit on the basis of the argument above, that even if the withdrawal of a juror and declaration of a mistrial was not justified by the evidence, then certainly the motion should have been construed by the Court as a Motion for Severance and separate counsel appointed to proceed with the Defense of each accused thereafter.

L. Yung vs Coleman, 5 F. Supp 702

3. Mental Examination

In construing Title 18, U.S.C.A. Section 4244, the Court of Appeals in this case rightly stated that a motion for medical examination will not be granted if not made in good faith or if based upon a frivolous ground and that Court went on to say:

> "The motion . . . fell short of meeting the statutory requirements as to the belief of the movant concerning the mental condition of the accused. Counsel did not say that he had reason to believe and did believe that the Defendants may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against them . . ."

The record in this case referred to in the Concise Statement relative to this point certainly contradicts this statement of the Court of Appeals. Movants were "sincere" in their belief and "firmly convinced" that the accused were mentally ill and so the motion was made in good faith and not frivolous,

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The Court states that it did not mean to infer that a motion under Section 4244 must be couched in the exact language of the statute, but, nevertheless, a close scrutiny of the opinion leaves no doubt but that statutory exactitude is being proscribed.

Again in its opinion the Court of Appeals referred to a statement made by Chief Counsel during a bench conference to the effect that he had no doubt as to the sanity of the accused, and again it is urged that it is not the opinion of counsel or that of the court which is controlling under the statute, but that of the movant and certainly a contrary opinion of at least two Associate Counsel invoking the application of the statute to the case was sufficient.

The Court is required to procure a mental examination upon a proper request therefor, and to determine itself on the basis of such examination, whether the accused is competent to stand trial. Perry vs. U. S., 195 F. 2d 37.

Certainly the legislative intent is clearly expressed in the simple language of the statute itself. It is there clear that whenever the United States Attorney or counsel for the accused or even the Court itself has reasonable cause to believe that a person charged with an offense may be insane or otherwise mentally incompetent, a judicial determination of such mental competency is required. That at least two of the Defense counsel had such reasonable grounds is clearly apparent from the record stated and it is urged that on the state of that record the Court might well have ordered such an examination on its own motion, especially when apprised of the brevity involved in the psychiatric reports tendered by the Government.

However, assuming arguendo, that the present record is not sufficient to have justified the granting of the motion when made during the trial, then Petitioners submit that the trial court erroneously

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excluded an entire line of questioning which would have persuaded the Court to call the statute into operation by ordering such an examination.

Every effort made by defense counsel during cross-examination of Government witnesses to extricate from lay witnesses opinions as to the mental condition of the Defendants immediately after the act was frustrated by the trial court in what must appear to have been an overzealous effort to exclude the question of sanity from the jury.

In this connection it is interesting to note a decision of this same Court of Appeals handed down July 22, 1954, just two weeks after sentence was imposed by the trial court below.

In Wear vs. U. S., U.S.C.A. (D.C., 1954) where the only question for the consideration of the Appellate Court was whether the trial court erred in refusing to grant a motion made during a trial pursuant to the statute for psychiatric examination, the Court held that if such an oral motion was made the trial court was obliged to follow the statutory procedure.

In its opinion the Court said:

> "The statute of which Section 4244 is a part was enacted in 1949 'to provide for the care and custody of insane persons charged with or convicted of offenses against the United States' . . . the Committee (Committee to study treatment accorded by Federal courts to insane persons charged with crime) recognized a need for the 'advice of trained psychiatrists . . . in the detection of mental disorders which may not be readily apparent to the eye of the layman'."

And the Court went on to say:

> "The statute makes no mention of any preliminary determination by the Court; read literally, only the moving party, not the Court, must have 'reasonable cause to believe'; and it speaks in mandatory terms regarding the Court's function thereunder providing that 'upon such a motion . . . the Court shall cause the accused . . . to be examined'. . . . This requirement confers upon the Court merely the limited power to refuse the motion and to deny it when the ground alleged is frivolous, or when the motion is not made in good faith. This conclusion precludes a weighing of evidence' by the Court to determine whether there is 'reasonable cause to believe.'"

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The Court then went on to reverse the trial court as it is contended it should have here, the circumstances being similar and the justification greater.

4. Burden of Proof (Sanity)

The question of whether or not the record revealed sufficient evidence to have shifted the burden of proving sanity of the accused to the Government was not considered by the Court of Appeals in its opinion. Petitioners here submit and argue that although the Government is not required to prove a Defendant's sanity so long as the presumption of sanity prevails, nevertheless, when some evidence of mental disorder is introduced, sanity, like any other fact, must be proved by the Government beyond a reasonable doubt. Tatum vs. U. S., 190 F.2d 612. In the case cited, although two Government psychiatrists had testified that the Defendant was of sound mind and only meager lay testimony was to the effect that he appeared abnormal, the Court of Appeals, nevertheless, held that an issue of sanity had been raised sufficient to warrant an instruction on that point to the jury.

In the Tatum Case, supra, the Appellate Court held that the burden of going forward with the evidence on the question of sarity shifted to the Government on the showing of "some evidence of mental disorder."

It is argued that any evidence of mental disturbance is "some evidence" of mental disorder.

> "Once the issue of sanity is raised by the introduction of 'some evidence', so that the presumption of sanity is no longer absolute, it is incumbent upon the trier of fact to weigh and consider the whole evidence, including that supplied by the presumption of sanity, upon the issue of the capacity in law of the accused to commit the crime." Davis vs. U. S., 160 U.S. 469.

Petitioners urge that in the instant case the act itself was sufficient in its very nature to have constituted "some evidence" but indeed, if it was not, then certainly the violent hysteria attested to by Government

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witnesses concerning Lolita Lebron and the abnormal calm similarly attested to with respect to at least one of the other Defendants, was sufficient, when taken with the Defendants' own testimony, to have shirted the burden of proof on the question of sanity to the Government.

The Court of Appeals' contention in connection with this point that Petitioners are contradicting themselves in postulating an inference of insanity from two opposite poles of the psychiatric universe, completely ignores the wide range and classified diversification of mental illnesses.

It is here contended, as was argued in the Appellate Court, that the record itself was sufficient to warrant an instruction to the jury on the question of sanity. And, arguendo, if it was not, then it would have been had the U. S. Attorney called Government psychiatrists as witnesses. The the Government did not do because of its confidence, growing out of the Court's repeated statement that it would not submit sanity to the jury in the absence of medical testimony, that it held the key to the entire question at least so far as this Court was concerned.

It is argued that had the Government felt the need for those witnesses, cross-examination would have opened the door completely on the question of sanity in the case of all of the Defendants even further than the record as it now stands did for reasons previously stated. Had this been the case, the Court undoubtedly would have granted Defendants' prayer for such an instruction. It must be pointed out that the trial court's denial of the Motion for Leave to Proceed to Investigate at Government Expense precluded the Defense from gathering together such witnesses as might have further raised the question of the mental condition of the accused.

Since the Defendants themselves vehemently refused the defense of insanity and refused the advice of counsel to submit to psychiatric examination, court-appointed counsel were left with no alternative but

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to proceed through trial in anticipation of raising sanity as a defense through cross examination of Government lay witnesses and through examination of the accused themselves. And as the record indicates, direct examination was limited by the trial court to areas excluding those in which a pattern of psychotic behavior might have been developed. Again assuming arguendo that the act, circumstances and present record were insufficient to shift the burden to the Government, then it is urged that the exclusion by the trial court of an entire line of questionning concerning the mental condition and physical appearance of the accused after the act and similar exclusion of an entire line of questionning directed to the Defendants themselves concerning their backgrounds and habits completely closed the mental door and deprived the accused of what possibly would have been their most substantial defense to the crime.

Certainly it is not difficult, unreasonable, or far fetched to postulate the jury rendering an altogether different verdict had counsel been permitted to argue (from evidence excluded) and the Court compelled to instruct on the question of insanity.

Such an instruction was judicially precluded when the trial court determined that sanity would not be an issue in the case unless raised through medical testimony and every effort by counsel to raise it was frustrated.

The trial court, it is argued, erroneously excluded Defendants' Prayer for Instruction No. 16 and failed to give that instruction to the jury even in essence. It is urged that this was reversible error.

5. Irresistible Impulse

The Court of Appeals did not consider this argument in its opinion.

From the outset at least one of Associate Counsel contended that insanity in the form of an irresistible impulse would be a logical defense

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if supported by all of the circumstances surrounding the fanatical attachment of the accused to the Puerto Rican Nationalist Movement and the effect of their devotion to that cause upon their minds. This was indicated in the Motion for Leave to Investigate at Government Expense and argued at the hearing thereof and reiterated many times as is apparent from the record quoted in this phase of the Concise Statement.

The court below eliminated the possibility of arguing this defense to the jury and an instruction by the court excluded such basic questions as, "Did you believe you were doing right when you did what you did on March 1st?"

Petitioners argue that counsel should have been permitted to delve to some limited extent into the background of the accused and to develop the fanaticism involved in their attachment to the Puerto Rican Nationalist Movement.

It was felt that the accused were not ashamed of what they had done and absolutely honest with counsel and on the witness stand, came to Washington as they had testified, for the sole purpose of demonstrating for their country's independence and that this demonstration did not involve an intent to kill anyone. However, during the frenzied course of their demonstration, knowing right from wrong, they, or some of them, were irresistibly driven by their zealot-warped, psychotic minds to do what they knew was wrong, bringing bodily harm to Members of Congress who became targets for their insane impulse.

It is argued that the excluded questions would have developed such an emotional fanaticism as to have warranted an instruction to the jury by the trial court on the law of sanity, especially with reference to "irresistible impulse". Smith vs. U. S., 36 F.2d 548.

And it is further urged that had the Court ordered the medical

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examination required by the statute; or the Government, feeling the compunction to call its psychiatrists as witnesses, (and subject to cross examination on psychotic elements involved in an irresistible impulse), then certainly this defense could have been argued to the jury and an instruction required. Again, Petitioners point out that repeated statements by the Court to the effect that no issue of insanity was apparent, afforded the Government the confidence it must not have felt rested in its available psychiatric testimony.

Significant here is a decision of this same Court of Appeals handed down July 15, 1954, just one week after imposition of sentence on these Defendants. In Stewart v. [illegible], 214 F.2d 879, in which the only substantial ground urged for reversal related to the Court's instruction to the jury on the defense of insanity, and where lay testimony adduced at the trial cited incidents of erratic conduct, including frequent outbursts of exagerated and purposeless violence as opposed to Government psychiatric testimony produced at the hearing of a pretrial motion for mental examination was to the effect that the accused was mentally competent to stand trial, and where insanity (irresistible impulse) was postured to the jury as a defense, the Appellate Court stated:

> "It was the jury's function to determine from all the evidence, including the expert testimony, not only whether Appellant suffered from an abnormal mental condition, but also whether the nature and extent of any condition from which it found him to be suffering was such to relieve him of criminal responsibility under the standards then prevailing."

It is pointed out that lay testimony concerning the mental condition of the accused at the time of the crime, was opposed at the trial by psychiatric testimony produced by the Government and holding him to be of sound mind but that, nevertheless, an issue of fact on the question of sanity was presented to the jury and an instruction given on the governing law including irresistible impulse.

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6. The Durham Case

The Court of Appeals did not consider this argument in its opinion.

In this landmark case the Appellate Court said:

> "In Tatum vs. U. S., we said 'when lack of mental capacity is raised as a defense to a charge of crime, the law accepts the general experience of mankind and presumes that all people, including those accused of crime, are sane' . . . 'as soon as some evidence of mental disorder is introduced, . . . sanity, like any other fact, must be proved as a part of the prosecution's case beyond a reasonable doubt.'"

At this point the Appellate Court in that case held that the trial judge had erred in failing to find "some evidence".

The Court discussed the Tatum Case and its applicability at great length, apparently affirming its conclusion that the "some evidence" rule was readily satisfied by meager lay testimony even when opposed by contradictory testimony of qualified and competent Government psychiatrists.

> "For once the issue of insanity is raised by the introduction of 'some evidence' sufficient the presumption of sanity is no longer absolute, it is incumbent upon the trier of fact to weigh and consider the whole evidence, including that supplied by the presumption of sanity."

> "The rule we now hold must be applied in the retrial of this case and in future cases . . . it is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."

> "Whenever there is 'some evidence' that the accused suffered from a diseased or defective mental condition at the time the unlawful act was committed, the trial court must provide the jury with guides for determining whether the accused can be held criminally responsible."

Petitioners here urge that the law of the Durham Case, supra, became governing law on the question of sanity in criminal cases in the District of Columbia before the imposition of sentence by the trial court below. That the elements of its opinion were argued by the Defense in support of its Prayer for Instruction No. 17 during the trial of the case; expanded and reiterated during argument on motion for a new trial subsequent to the Durham decision. Sentence and judgment were not imposed

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until subsequent to the change in the governing law. The principles set forth in the Durham Case were conclusively persuasive and the new trial sought should have been ordered by the trial court. It is the position of Petitioners that the application of the Durham Case to the instant case would necessarily require a shifting of the burden of proof, after introduction of psychiatric testimony and warranted the instructions sought and denied.

A Fortiorari, the new standard for the determination of criminal responsibility proscribed in the Durham Case, when applied to the facts of the instant case upon a new trial of the issues, would result in a diminuition of the trial court's sensitivity on the vital questions, here excluded, calculated to raise those elements in a defense based upon criminal responsibility rather than insantiy.

See Mallett vs. State of North Carolina, 21 S. Ct. 730

The ultimate question that must be decided by this Court is whether a criminal trial ends when the jury returns its verdict for if it does not, a motion for new trial before sentence and judgment should be granted when a controlling Court of Appeals has, in an opinion, substantially altered applicable standards.

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7. Motive in Negation of Intent Inferred from Acts and Circumstances

This portion of the Petition is submitted in behalf of the three male Petitioners only inasmuch as Lolita Lebron was ultimately acquitted by the jury of the counts charging her with assault with intent to kill.

The Court of Appeals, Petitioners submit, erroneously construed the evidence, as excerpts from the record referred to in the Concise Statement on this point clearly indicate. The Court absolutely refused to permit any testimony to creep into the record concerning the motives of the Defendants below.

The statutory crime of assault with intent to kill is one which requires proof of specific intent beyond a reasonable doubt. It is argued in this connection that the ultimate verdict of the jury was so inconsistent with the evidence as to warrant reversal or the granting of a new trial on motion made before sentence.

For, in acquitting Lolita Lebron on the first five counts the jury obviously found that she lacked the intent that the other Defendants shared and there is absolutely nothing in the evidence to support the conclusion that her intentions differed from those of her companions.

Obviously the jury must have reasoned either that the initial intent of the group when it planned its demonstration at the Capitol was not to kill anyone or that there was such intent initially but that Lolita Lebron withdrew sometime after it was formed and before the act was consumated. This conclusion, again, is absolutely inconsistent with the evidence.

Petitioners here note that the Defendant Lolita Lebron was acquitted by the jury 1 hour and 20 minutes after the trial court, on request for further instructions, gave to the jury in substance, the rejected Prayer No. 13 relating to the question of intent and aiding and abetting. The male

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Defendants, not having the benefit of that instruction, had been found guilty on the first five counts the preceding evening.

> "Each and every element of the statutory crime of assault with intent to kill must be proved by the Government beyond a reasonable doubt." Hammond vs. U. S., 127 F.2d 752.

Petitioners argue that since evidence of motive is permitted by the Government when it bears upon the intent of the accused, the Defense likewise should be permitted by the trial court to introduce with some limitation evidence of motive from which the jury may negate the inference of criminal intent. This kind of testimony should especially be made available to defendants accused of a crime such as here from the mere commission of which and all the surrounding circumstances such an inference is always inevitable.

> "Wide latitude is afforded the Government in criminal trials in ascertaining the motive which actuated the commission of a crime." Lomax vs. U. S., 37 App. D. C. 414, and Hallack vs. U. S., 185 F. 417,

and,

> "Accused should be allowed to testify as to his intent." Crawford vs. U. S., 29 S. Ct. 260.
>
> "Where the intent of an accused is material in a prosecution, accused may testify as to that intent." Cummins vs. U. S., 232 F. 844, and Buchanan vs. U. S., 233 F. 257

It is pointed out that in the last cited case Defendants were upheld in their right to show statements of third parties as evidence of their actual motive bearing on intent.

8. Merger of Lesser Offense into Greater Crime Charged

The Court of Appeals did not consider this point in its opinion.

It is a well settled principle of law in this jurisdiction that an aggravated assault includes all of the lesser crimes of an assault.

When the trial court denied Defense's motions for judgment of acquittal on the last five counts of the indictment, the Court in effect permitted the jury to speculate upon the guilt or innocence of the accused

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with respect to five crimes they could not have committed.

Each assault alleged was either a simple assault, an assault with a dangerous weapon, an assault with intent to kill, or not an assault at all, depending upon the degree of intent and aggravation determined by the jury from the evidence.

The trial court attempted to distinguish this case from other cases of multiple indictment and justify submitting all ten counts to the jury observing that the first five counts did not refer to the weapon or weapons used. This attempted distinction is almost ridiculous for if I fire a gun at a man and would him, I either intended to kill him or I merely assaulted him but I did not assault him twice.

Nor does the imposition of sentence to run concurrent with that imposed for the greater offense eradicate the harm done when the court permitted the jury to speculate (and possibly compromise) upon ten crimes when only five were committed.

Despite the fact that only a single assault was committed upon the person of each of the five Congressmen, an indictment charged each Defendant with two such assaults and the Court sanctioned the indictor by submitting the case to the jury as it did. Read vs. U. S., 2 D. C. 198.

Judicial sanction of this kind afforded to multiple indictments would persuade over zealous prosecutors to secure from the Grand Juries indictments containing a count for every lesser offense involved in the greatest possible chargeable offense. Thus the whim of the indictor might come to determine the maximum or minimum punishment ultimately meted out to persons convicted of crime and that is exactly what this trial court did when it gave substance to the mere form in which the indictment was drawn by sending all ten counts to the jury.

Legislation, encompassing criminal acts perpetrated, without specific intent to harm or malice toward anyone in a group gathered in

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a public meeting place, would seem to be the only solution to the problem imposed by the commission of a crime such as this, but certainly judicial acquiescence in the technical drafting of criminal indictments is not.

9. The Instructions

This argument was not considered by the Court of Appeals in its opinion.

Considering the charge given to the jury by the trial court as a whole, one must conclude that the trial court confused the indictment under which the Defendants were charged with one for conspiracy. During its instruction, the Court continuously referred to a "pre-conceived plan" and "acting in concert". (TR. 1261, 1266, 1267, 1269)

These Defendants were indicted as aiders and abettors under our statute and not as co-conspirators, and the elements of a preconceived plan and concerted action are peculiar to the crime of conspiracy and not applicable where an indictment calls into play the principal and accessory statute here involved.

It is urged that this misconception was so confusing to the jury as to constitute reversible error.

> "An instruction susceptible of two constructions is erroneous because it has a tendency to confuse and mislead the jury." Carpenter vs. Com. Gen. Life Ins. Co., 68 F.2d 69 and Bollenback vs. U. S., 66 S. Ct. 402.

> "An instruction must be so framed that a jury may not draw the wrong conclusion therefrom, and it is not sufficient that it is so drawn that a jury may reach the right conclusion." Miller vs. U. S., 120 F.2d 968.

> "An instruction which singles out and declares effect of certain facts without consideration of other modifying facts, constitutes prejudicial error." Meadows vs. U. S., 82 F.2d 881

Concluding its charge, the Court said:

> "You will bring in a separate verdict as to each of the four Defendants on each of the ten counts of the indictment. In other words, there will be forty verdicts." (Emphasis supplied)

> "An instruction should be construed as a whole and if when so taken it may tend to confuse the jury, convey the court's

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> "predilection of the guilt of the accused, or in any way detract from the fair and impartial trial to which every accused is entitled, then it must be considered as a denial of due process of law." Kenard vs. U. S., 101 F. 2d 246

Indicative of the confusion created in the minds of the jury, is the fact that shortly after it retired to consider the case the jury returned with the request for further instructions (TR. 1284) and the foreman, speaking for the jury, said:

> "Please, may we have the Court's instructions on the law as to what constitutes (a) an assault with a dangerous weapon, (b) an assault with intent to kill, and (c) aiding and abetting."

How can we conclude otherwise but that the jury was absolutely confused by the instruction given, when, so soon after retiring, it returned to request the Court for additional instructions on the only applicable and germaine law?

In order to arrive at its verdict, the jury was to apply the facts of this case to the instructions given it by the Court on the law governing assault with intent to kill, assault with a dangerous weapon, and aiding and abetting. This it found impossible to do and required a re-instruction of the Court, then during this same intermission, after the Court had repeated its instruction on the graveman elements involved in the jury's deliberations and before the jury returned to further deliberate, the foreman again rose to ask (TR. 1285, 1286),

"What constitutes intent?"

Can there be stronger evidence than this of utter confusion in the jury room?

Assault with a dangercus weapon:

When the trial court refused the substance contained in Defense Prayers Nos. 6 and 7, it completely and erroneously eliminated from the jury's deliberations, any consideration of the necessary element of criminal intent as it relates to the crime of assault with a dangerous weapon. As a matter of fact, this same necessary element of criminal

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intent was similiarly precluded to the jury when the Court refused to grant Defense Prayer No. 5, which related to the crime of assault, a lesser ingredient of the same crime which should have been submitted for the jury's consideration.

Petitioners conceds that the jury has a right to infer criminal intent from the mere commission of the act and all the surrounding circumstances but argue that the accused are entitled to an instruction from the Court indicating the necessity of drawing that inference beyond a reasonable doubt. No such instruction was here given by the trial court. In addition, and inasmuch as the actual question has never been decided in this jurisdiction, by this Court, or any other Federal Court, it is urged that a strong minority of opinion holds that the mere act of firing into a crowd does not eliminate the requirement that specific intent be proved. State vs. Godfrey, 20 Pac. 625; People vs. Sylva, 76 Pac. 814; People vs. Doud, 193 N. W. 884; State vs. Williamson, 102 S. W. 519; People vs. Keefer, 18 Cal. 637; State vs. Mulball, 97 S. W. 583.

Assault with intent to kill:

In denying Defense's Prayers for Instructions Nos. 7, 9, 10, 11, 14 and 15, the trial court excluded from the jury a proper statement of the law applicable to the facts of this case with respect to the crime of assault with intent to kill. Here, again, the crime involves proof by the Government beyond a reasonable doubt of specific criminal intent and although it is conceded that such intent might be inferred from the act and surrounding circumstances, nevertheless, Petitioners urge that an accused is entitled to have the jury apprised of the necessity of drawing that inference beyond all reasonable doubt.

Again, as is argued in connection with the crime of assault with a dangerous weapon, there is a strong minority holding that firing a weapon into a crowd of people does not exclude the need for proving criminal intent. Ibid.

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Acceptance by this Court of that rule of law for this jurisdiction would require this Court to find reversible error in the trial court's charging the jury as follows:

> (TR. 1269)
> "To discharge a firearm into a group of people constitutes an assault even though there is no specific intent to hit any particular person within the group."

Aiding and abetting:

Defense Prayers numbered 11, 13 and 14 represented in substance a proper statement of the law in aiding and abetting and their denial by the trial court was prejudicial error. District of Columbia Code, Title 22, Section 105; Ladrey vs. U. S., 81 U. S. Apps. D. C. 127; Polen vs. U. S., 41 App. D. C. 4; U. S. vs. Geare, 54 App. D. C. 30; Morei vs. U. S., 127 F. 2d 827

It should be here pointed out that at the conclusion of its charge to the jury, Defense counsel requested the trial court to clarify its instruction on the law of aiding and abetting at least by applying an applicable instruction on reasonable doubt. This element had been completely overlooked by the Court when it charged the jury on what it construed to be the governing law of aiding and abetting.

Petitioners contend that the burden of proving beyond a reasonable doubt that one aided and abetted another in the commission of a crime is on the Government and that one accused of a crime involving that form of participation is entitled to the application of that principle of law by the jury to the facts of the case.

And during the same bench conference, (TR. 1280) the Court was also asked to instruct the jury as follows:

> "That the intention formed in New York does not govern, but that they must find beyond a reasonable doubt that the intention was present at the time the act was committed."

Both requests were denied. (TR. 1281)

> "A court may amend its instruction to cure a suggested defect." U. S. vs. Vanco, 131 F. 2d 123

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"Before one Defendant can be held responsible for the criminal act of another, the connection or joint connection of the undertaking must clearly appear. It is not sufficient to establish merely a common purpose." U. S. vs. Geare, supra.

"Where several acts constitute together one crime, if each act is separately performed by a different individual in the absence of the rest, all of the individuals are principals as to the whole crime." Alexander vs. U. S., 95 F. 2d 873.

But,

"Mere knowledge that a crime is being committed is not equivalent to participation with criminal intent." Boyett vs. U. S., 48 F. 2d 482.

And,

"If many go to do an unlawful act, and one only does it, all are principals; if they go to do a lawful act (demonstrate) and all but one commit a felony, in his presence and without his participation, that one is not guilty." U. S. vs. Jones, 3 Wash. C. C. 209

"The mere presence of Defendant at the time and place of the perpetuation of a felony by another person, does not make Defendant a principal offender, even though he made no effort to prevent the crime." U. S. vs. Peverson, 12 D. C. 152

It is here pointed out that the Government produced no testimony concerning the science of ballistics and there was absolutely no evidence at the trial of which bullets found came from each of the Defendants' guns, if any.

To have been found guilty as they were, some of the Defendants must have been determined by the jury to have been principals and others aiders and abettors sharing in the criminal intent of a principal connected by the jury to one of the five assaults committed.

Individually the Defendants could not at one and the same time have been principals as to one assault and aiders and abettors as to the others.

Since it is obvious from the verdict of the jury in acquitting Lolita Lebron on the first five counts, the jury could not have determined that all of the accused were principals. Therefore, unless the verdict ultimately rendered represented utter confusion, and we submit that it does, the jury found some of the Defendants principals to one act of assault and accessories to others. The application of this reasoning to the evidence

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leaves no conclusion other than that the verdict as rendered was not supported by the evidence resulted from an inadequate or improper instruction on the law of aiding and abetting.

Properly, under this indictment and on the evidence before it, the jury could have found each Defendant guilty of no more than one assault.

A theory of aiding and abetting as accessories such as is presented by this indictment necessarily assumes that as to each crime alleged there is a principal and the remaining accused must be regarded as accessories. Their relationship as such may vary with respect to each assault. When the evidence shows as here that the action was spontaneous and the acts simultaneous, then there can be no presumption that all of the accused acted as principals and as accessories at one and the same time.

Had the evidence been that one accused perpetrated all of the assaults, and that the others, knowing he so intended, joined with him in the intent but stood by with their guns in their belts, then we would concede the propriety of the instructions given which resulted in the verdict rendered.

However, in the absence of such proof or similar probative facets of proof, it is Petitioners' contention that the jury should not have been permitted to speculate upon the questions of who struck John and which of the four aided and abetted as to each alleged assault. Obviously in the resultant confusion the jury must have been constrained to have found each as responsible as the other and weighed the evidence as to none.

And in connection with this argument, Petitioners submit that on the second day of its deliberations, having already found the male Defendants guilty of assault with intent to kill, the jury returned a second time

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for further instructions at about 4:30 P. M. (TR. 1313)

> "The jury seems to be at a deadlock, . . . if there is no indication of intent to kill, can the Defendant be found guilty of the charge of intent to kill by aiding and abetting.?"

Thereupon, for the first time, the Court properly charged the jury on aiding and abetting and in so doing granted the substance of Prayer No. 13, previously denied and during a bench conference immediately following, the judge said:

> "I must say that I have some doubt in my mind as to whether the aider and abettor must know or share in the intent. Having a doubt in my mind, I gave the Defense the benefit of that doubt."

Were not the male Defendants entitled to the benefit of the same doubt and the same instruction of law that the female Defendant was? We note that she was acquitted of the crime of assault with intent to kill approximately one hour after the Court finally stated properly the applicable law.

10. Further Instructions

During its deliberations the jury twice returned with its request for further instructions and the requests were granted by the Court.

> "Where a jury desiring additional instruction, makes explicit its difficulties, the trial judge should clear them away with concrete accuracy." Coupe vs. U. S., 113 F. 2d 145. (Emphasis supplied)

> "Recalling the jury to deliver 'the Allen charge' is not prejudicial, when given with consent of counsel." Ibid.

> "It is improper to give any instruction to the jury after they have retired, upon any question not asked by the jury." U. S. vs. White, 5 D. C. 116 (Emphasis supplied)

The Court, in granting the first request, repeated in substance its original charge to the jury on assault, assault with intent to kill and aiding and abetting and, Petitioners urge, repeated the misstatement of applicable law argued above by omitting what is contended to be a necessary instruction on the element of criminal intent in a felonious assault.

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When the Court completed its instruction pursuant to the specific request made, the United States Attorney requested a bench conference and there asked the Court to submit to the jury at this time additional instructions:

> ". . . understanding assault with intent to kill. Does Your Honor think you would be justified in pointing out in detail a little more the circumstances you speak of."

and this over the strenuous objection of counsel for the Defense. (TR. 1288, 1289)

Thereupon, the Court proceeded to further instruct the jury on matters not requested and despite the fact that the foreman had previously announced that the jury was satisfied and had no further questions. (TR. 1288, 1289) (Emphasis supplied)

Petitioners submit that the instructions given at this time upon the request of the United States Attorney and after the jury had announced its satisfaction with the further instructions given, was a fatal error within the rule of the White Case, supra, which, though mellow with age, is, nevertheless, prevailing law in this jurisdiction. It is noted here that only two hours after the additional instructions, conveniently made at the request of the Government were given, the jury returned with a partial verdict, which was accepted by the Court.

11. Piece-meal or Partial Verdict

Over the objection of counsel (TR. 1296, 1297) the Court accepted the verdict of the jury as to all Defendants on the last five counts of the indictment. (TR. 1298, 1299 and 1300). Shortly thereafter the Court said:

> "You might further simplify your labor by doing this when you return: Take up each Defendant separately as to the first five counts . . . and if you agree upon any one Defendant, . . . you can come in and bring in the verdict."

Thereupon the Court recessed for dinner, and the jury returned to deliberate at 7:30 P. M. At 11:20 P. M., they returned to the Court room and announced that they had reached a verdict as to the three male

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Defendants on the first five counts (TR. 1304) which the Court received. (TR. 1305, 1306)

Petitioners contend and urge that by accepting the jury's verdict in this "piece-meal" manner and statements made by the trial court in so doing, the trial court effectively coerced an unfavorable verdict and deprived the accused of due process of law by limiting the area for compromise and adjustment of natural differences of opinion among the jurors.

> "Permitting a jury to return its verdict on some counts of an indictment before it has reached a verdict on other counts is not erroneous in absence of affirmative indication that rights of Defendants were affected. Clainos vs. U. S., 163 F. 2d 593 (Emphasis supplied)

Petitioners point out that this case falls within the exception of the Clainos Case, supra, because substantial rights were affected, pointed out to the trial court and objection made.

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(h) CONCLUSIONS

1. The Court of Appeals erred in sustaining the trial court's refusal of a timely motion made before trial by court-appointed counsel for leave to proceed with a reasonable and limited investigation at the expense of the Government for the purpose of determining whether the defense of insanity (irresistible impulse) was available to the accused. This is a novel question in Federal jurisprudence and should be determined by this Court, since substantive rights quaranteed by the Fifth and Sixth Amendments to the Constitution are involved.

2. The Court of Appeals erred in sustaining the trial court's refusal to grant a Motion for the Withdrawal of a Juror and Declaration of a Mistrial made at the conclusion of the Government's case-in-chief. The trial court, in denying the motion, deprived the Defendants of their right to enjoy a speedy and public trial and to have the assistance of counsel for their defense as guaranteed by the Sixth Amendment. If the evidence at the time the motion was made was insufficient to warrant a mistrial, then certainly the Court on its own motion should have severed counsel and provided a separate and independent defense for each of the accused.

3. The recorded evidence was sufficient at the time a motion by Defense counsel was made for a mental examination of the Defendants and that motion should have been granted by the trial court but if it was not, arguendo, then certainly the trial court committed grave error in excluding an entire line of questioning which would have developed the question of mental condition sufficiently to warrant the granting of the motion and the Court of Appeals erred in sustaining the trial court's rulings.

4. The record and circumstances surrounding the trial, if indeed not the act itself, was sufficient to constitute "some evidence" of mental

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disorder, and the burden of proving the sanity of the accused should have shifted to the Government and an instruction to the jury on the applicable law of sanity given by the trial court. By assuming the record insufficient when considered with the circumstances surrounding the case and the act itself, by the presumption of sanity, then the trial court erred in excluding on both cross examination of Government witnesses and direct examination of the accused, entire lines of questioning which would have resulted in "some evidence" of mental disorder and resulted in a shifting of the burden of proof and consequent necessity of instruction on the question of sanity to a jury.

5. The exclusion by the trial court of an entire line of questioning calculated to develop certain fanatical attachment of the accused to the Puerto Rican Nationalist Movement, which resulted in the warping of their minds and distortion of their sense of values and complete emotional instability, precluded to the Defendants the defense of insanity in the form of an "irresistible impulse" and deprived them of due process of law and a fair and impartial trial.

6. Defense motion, argued subsequent to the Durham Case, should have been granted and a new trial ordered since sentence and judgment were not imposed until subsequent to the alteration of controlling law, which would have made available to the accused, defenses precluded by this trial court.

7. The Court of Appeals erroneously construed applicable law in other Federal jurisdictions in sustaining the trial court's refusal to permit Defense counsel to ask questions calculated to establish the motive of the accused and for the purpose of negating the inference of an intent to kill which the jury, under the peculiar circumstances of this case, might infer from the act itself and all of the surrounding circumstances.

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8. The trial court erred in denying Defense motions for judgment of acquittal of each Defendant on the five counts of the indictment charging them with assault with a dangerous weapon since those counts were merged into those charging an inclusive greater offense.

9. The trial court erred in refusing to grant prayers for instructions; the instruction given inadequately or improperly stated the applicable law; and the instructions considered as a whole were so confusing to the jury as to deny the Defendants of a fair and impartial trial.

10. The trial court erred when it instructed the jury beyond the scope required in the jury's request for "further instruction" and after the jury had announced its satisfaction with the renewed instruction given over the objection of Defense counsel.

11. The trial court, in accepting the verdict of the jury "piecemean" and effectively coercing that jury by so doing, deprived the accused of a fair and impartial trial and in so doing, committed reversible error.

Respectfully submitted,

Ben Paul Noble
1124 Warner Building
Washington 4, D. C.
Attorney for Petitioners

CERTIFICATE OF SERVICE

I certify that the foregoing Petition for Writ of Certiorari was served by mailing, first class, postage prepaid, 3 copies to the Solicitor General, Department of Justice, Washington 25, D. C., and 3 copies to Oliver Gasch, Esq., U. S. Attorney, U. S. Court House, Washington, D. C., on this 24th day of April, 1956.

Ben Paul Noble

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,317

LOLITA LEBRON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 12,318

RAFAEL CANCEL MIRANDA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 12,319

ANDRES FIGUEROA CORDERO, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 12,320

IRVING FLORES RODRIGUEZ, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court
for the District of Columbia

Decided October 13, 1955

Messrs. Ben Paul Noble and *James C. Toomey* with whom *Mr. H. Hugo Perez* was on the brief, for appellants.

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Mr. John C. Conliff, Assistant United States Attorney, with whom *Messrs. Leo A. Rover,* United States Attorney, and *Lewis Carroll* and *John D. Lane,* Assistant United States Attorneys, were on the brief, for appellee.

Before WILBUR K. MILLER, WASHINGTON and DANAHER, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* The four appellants, who are Puerto Ricans and fanatical members of an anti-American political party on that island, had a meeting February 28, 1954, in New York, where they were then residing. They planned to go to Washington the next day for the purpose of visiting the Capitol and demonstrating for Puerto Rican independence by shooting at members of Congress. They arrived in the District of Columbia shortly after noon March 1 and after lunch proceeded to a gallery of the House of Representatives. Each was armed with a .38 calibre German pistol and together they had 90 rounds of ammunition. About 2:30 p.m., when 243 Congressmen were engaged in voting on the floor of the House, appellant Lolita Lebron arose, waved a Puerto Rican flag, shouted the imperative demand, "Free Puerto Rico," and began shooting. Her companions then stood and shot their pistols toward the floor of the House. Some 16 shots were fired and five Congressmen were wounded before the appellants were overpowered and disarmed.

They were indicted March 3 in ten counts, the first five of which charged them with assault with intent to kill (a separate count being devoted to the assault upon each victim) and the second five accused them of assault with a dangerous weapon. Upon arraignment the defendants pleaded not guilty and four able and experienced attorneys were appointed to represent them.

Trial began June 3 and was concluded June 17. Under the five counts charging assault with intent to kill, Lolita Lebron was acquitted, but her three male companions were

found guilty and five consecutive sentences of from 5 to 15 years were imposed upon them. Under the five counts which charged assault with a dangerous weapon, all four appellants were found guilty and received five consecutive sentences of from 40 months to 10 years; those imposed upon the men to run consecutively with the longer terms they received on the other five counts.

On these appeals, diligent appointed counsel advance many reasons for reversal. Among them are the contentions that the trial court erred in refusing to order a psychiatric examination to determine defendants' mental competency to stand trial, and in refusing to submit to the jury the question whether the defendants were sane when they fired their pistols into the crowded well of the House of Representatives. These contentions are of course not identical and require separate consideration.

1. Concerning alleged mental incapacity to stand trial, the applicable statute is 18 U. S. C. § 4244, which in pertinent part is as follows:

> "Whenever after arrest and prior to the imposition of sentence . . . the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused . . . to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. . . ."

An attempt to invoke this statutory provision was made at the close of defendants' evidence, when one of associate defense counsel made this statement:

> "If your Honor please, at this time it has occurred to us as counsel for these people, for these defendants, there is probably something mentally wrong with them.
>
> "We are asking the Court at this time to have these people examined by psychiatrists other than those who Mr. Rover [the United States Attorney] had examine them. Because of the conversation, the testimony on the witness stand, and what the testimony was, their lack of remorse, their peculiar attitude towards this entire situation, that I am firmly convinced there is a strong probability that these people are mentally unstable."

Such a motion will not be granted if it is not made in good faith or if it is based upon a frivolous ground. *Wear* v. *United States,* 94 U. S. App. D. C. 325, 218 F. (2d) 24 (1954). The motion in this case, quoted above, fell short of meeting the statutory requirements as to the belief of the movant concerning the mental condition of the accused. Counsel did not say he had reason to believe and did believe that the defendants "may be presently insane" or otherwise so mentally incompetent as to be unable to understand the proceedings against them or to assist in their own defense. He merely said, "[I]t has occurred to us . . . there is probably something mentally wrong with them," and "I am firmly convinced there is a strong probability that these people are mentally unstable."

There may be something mentally wrong with an accused person or he may be emotionally unstable, and yet he may not be insane within the meaning of the statute and may be mentally competent to stand trial. We do not mean to say a motion under § 4244 must be couched in the exact language of the statute; but it is insufficient unless its recital approximates the meaning of the statutory language. *Cf. Perry* v. *United States,* 90 U.S.App.D.C. 186, 195 F.(2d) 37 (1952).

Even more importantly, the ground for the motion stated by the movant here was slight indeed, and of little weight or importance, and so was frivolous. It set forth

no particulars and can be characterized as a statement of vague impressions. Moreover, the chief counsel for the defense had already told the court he had talked with the defendants many times and had no doubt as to their sanity. It should be noted too that soon after the shooting, the Government had the defendants examined by three psychiatrists who found them sane. They were not called upon to testify, but copies of their reports were furnished to defense counsel well in advance of trial. We hold the District Court did not err in denying the motion for a psychiatric examination.

2. In support of their contention that the District Court erred in refusing to submit to the jury the question of the defendants' sanity at the time of the shooting, it is pointed out that this court has twice said[1] that whenever there is some evidence of insanity, a factual issue for the jury is formed, and the Government must prove sanity in order to convict, just as it must prove every ingredient of the crime. Defense counsel argue that the very acts of the defendants in the House gallery were sufficient to raise an issue as to their sanity. They suggest also that testimony which described the male appellants as being "abnormally calm and anything but agitated" after the shooting, should be regarded as "some evidence" of insanity; but at the same time they say that testimony concerning Lolita Lebron's hysterical behavior before and during the shooting constituted "some evidence" of mental disorder so as to require the prosecution to prove sanity. Her notion that she was emulating George Washington is also emphasized. And appellants' adherence to an organized minority group in Puerto Rico is said to indicate irrationality.

The trial judge correctly held these considerations insufficient to raise an issue as to appellants' sanity. More-

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[1] *Tatum* v. *United States*, 88 U. S. App. D. C. 386, 190 F. (2d) 612 (1951); *Wright* v. *United States*, 94 U. S. App. D. C. 307, 215 F. (2d) 498 (1954).

over, the appellants themselves flatly refused to rely upon insanity as a defense; and at the close of the Government's case, chief counsel for the defense acknowledged that long before the trial he had received the reports of the three psychiatrists who had examined the appellants at the request of the Government and had found them to be of sound mind. He added, as we have seen, that he had talked to appellants many times and had no doubt as to their sanity.

3. The appellants say they were prevented from attempting to discover evidence to support a plea of insanity by the court's denial of their pre-trial motion that their counsel be authorized to "proceed with the investigation" at appellants' former places of residence—New York City and Puerto Rico—at the expense of the Government, because "No evidentiary information concerning their background, mental health and emotional stability, character and group identification, is available in the District of Columbia." Appellants cite no authority for such a fishing expedition at the expense of the United States, and we know of none. The denial of the motion was not error.

4. The trial judge is charged with error in refusing to declare a mistrial at the close of the evidence for the prosecution on the ground that each defendant was entitled to be represented by separate counsel. The point was raised at the trial when, at the close of the Government's case in chief, one of the associate counsel for the defense, saying the action was his own and not that of other counsel, moved as follows:

> "I would like to move at this time for the withdrawal of a juror and the declaration of a mistrial on this basis: I feel that in an assigned case that each defendant is entitled to separate representation . . . .
>
> • • • •
>
> "That the defendants under the Constitution of the United States are entitled to independent representa-

tion, one assigned, when counsel are assigned by the Court . . . ."

He added that at the stage of the trial then reached it appeared there might be "independent and separate defenses for . . . the defendants Miranda, Rodriguez and Lebron . . . ."

Chief counsel for the appellants then stated:

> "I think I should say this, if your Honor please: On at least two occasions we have discussed very carefully with each defendant, with the non-English speaking defendants through an interpreter, the question as to whether in the mind of any one of them there was any conflict of interest or difference of point of view, advising them that if that were so, I would suggest that we divide ourselves and one represent each of the four.
>
> "On all or on each of two occasions they insisted that there was neither a conflict of interest, division of opinion, and that what they did they did jointly and they wanted to be defended by the four of us."

Thereupon the associate counsel who had made the motion observed:

> "There is no disagreement between counsel. I am merely making the motion for the record, if your Honor please."

Appellants were not entitled to be represented by separate counsel unless there was some inconsistency in joint representation. Judge Morris guarded against the possibility of prejudice when he appointed the four attorneys and designated one as chief counsel and the other three as associate counsel: he stated that, if any conflict of interest should develop, he would apportion the attorneys among the several defendants. Counsel press the point on appeal but do not point out any conflict of interest, and we observe none.

5. With respect to the conviction of the three male defendants under the counts charging assault with intent to

kill, counsel assert that "evidence of motive as bearing upon the negation of the intent to kill should have been admitted by the court below." They reason that since the prosecution may show motive in order to prove intent to kill, a defendant should be allowed to show a motive that indicates lack of such intent.

The male appellants were allowed to testify that they did not intend to kill the particular legislators who were shot—that they had no personal animosity toward them; they said, however, that they intended to kill members of Congress in order to draw attention to the alleged wrongs of Puerto Rico. Moreover, defense counsel overlook the fact that the law sharply limits the relevancy and materiality of motive in cases such as this. As we said in the *Collazo* case:[2]

> ". . . If the fact of killing by an accused is in issue . . . the prosecutor is permitted . . . to prove that the accused had a motive . . . . Likewise, in such a case, the accused . . . is permitted to prove that he had no motive, no reason, for killing the deceased. . . . But, if a killing is purposed (intended) and none of the established legal excuses for purposed killing is pleaded, the motive of the killer is wholly immaterial. The courts frequently point out that not even the highest motive, outside the well-recognized legal justifications, is a defense to purposed killing. . . ."

In addition to the arguments we have considered and rejected in the foregoing portion of this opinion, the appellants advance several other reasons for reversal. We have carefully considered these further contentions but regard them as so insubstantial as not to require discussion.

Though they were indigent strangers unable to speak our language, the appellants were ably represented by capable, conscientious counsel. The patient presiding judge

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[2] *Collazo* v. *United States*, 90 U. S. App. D. C. 241, 247, 196 F. (2d) 573, *cert. denied* 343 U. S. 968 (1952).

permitted more than ten days to be consumed in their trial which, had the situation involved been less dramatic, could well have been completed in half that time. The jury's verdicts show they were the result of intelligent, dispassionate deliberation. Thus the appellants were afforded every protection which our law gives to any person charged with crime. Their guilt was clear, and their convictions must stand.

Affirmed.

722 Misc
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NO. 722 MISC.

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FILED
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1955

No. 722

No. 12, 317

Lolita Lebron, Petitioner
v.
United States of America, Respondent

No. 12, 318

Rafael Cancel Miranda, Petitioner
v.
United States of America, Respondent

No. 12, 319

Andres Figueroa Cordero, Petitioner
v.
United States of America, Respondent

No. 12, 320

Irving Flores Rodrigues, Petitioner
v.
United States of America, Respondent

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to

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CERTIFICATE OF SERVICE

I certify that the foregoing Index to Petition for Writ of Certiorari was served by mailing, first class, postage prepaid, 3 copies to the Solicitor General, Department of Justice, Washington 25, D. C. ; and 3 copies to Cliver Gasch, Esq., U. S. Attorney, U. S. Court House, Washington, D. C., on this 10th day of May, 1956.

Ben Paul Noble

No. 722 Misc.

Office - Supreme Court, U.S.
MAY 1956

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

LOLITA LEBRON, RAFAEL CANCEL MIRANDA, ANDRES FIGUEROA CORDERO AND IRVING FLORES RODRIGUEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 229 F. 2d 16 (Pet. App. A).

JURISDICTION

The judgment of the Court of Appeals was entered on October 11, 1955 (Pet. App. A). A petition for rehearing was denied on February 24, 1956. The time within which to file a petition for a writ of certiorari was extended to April 24, 1956, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the insanity of petitioners was or should have been an issue in the case when the appointed chief defense counsel and petitioners themselves refused to raise the issue.

2. Whether the trial court erred when, at the close of the government's case, it denied a defense motion for a mistrial on the ground that petitioners should have had separate counsel.

3. Whether the trial court erred when it excluded all questions as to motive directed to petitioners.

4. Whether the trial court erred in denying the defense motion for judgment of acquittal on the five counts charging assault with a dangerous weapon and submitting them to the jury along with the five counts charging assault with intent to kill, in the face of the contention that the former are lesser included offenses within the latter.

5. Whether the jury were properly instructed.

6. Whether the trial court erred when it accepted partial verdicts from the jury in the course of their deliberations.

STATEMENT

Petitioners were tried in the United States District Court for the District of Columbia on a ten-count indictment charging them with having feloniously assaulted five persons on March 1, 1954 (R. 1374-1375). The first five counts charged each petitioner with assault with intent to kill in violation of 22 D. C. Code (1951 ed.) 501 and the last five counts charged each with assault with a dangerous weapon in violation of 22 D. C. Code (1951 ed.) 502 (R. 1374-1375). The three male petitioners were convicted on all ten counts (R. 1433-1435) and the female petitioner was convicted on the last five counts (R. 1432). The male petitioners were sentenced to consecutive terms of imprisonment for 5 to 15 years on each of the first five counts, and to imprisonment for 40 months to 10 years on each of the last five counts, the sentences on the last five counts to run concurrently with those on the first five counts (R. 1433-1435). The female petitioner was sentenced to consecutive terms of imprisonment for 40 months to 10 years on each of the last five counts (R. 1432). On appeal, the judgments were affirmed.

The evidence for the government may be summarized as follows:

On Monday, March 1, 1954, the House of Representatives was in session at the Capitol. On that day petitioners had come to Washington from New York, arriving before noon (R. 1073, 973). Each was armed with a heavy caliber automatic pistol of German make (R. 717, 774-775,

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789-793). About 2:00 p.m. they went to the Capitol and were admitted to gallery 11 in the southwest corner of the House Chamber (R. 366-367, 1122-1123).

At about 2:30 p.m., petitioner Lebron arose, waved a Puerto Rican flag she carried, shouted "Free Puerto Rico", and began shooting (R. 938, 947). Thereupon the other petitioners arose and began firing their pistols (R. 204-205). When the shooting began there was in progress on the floor of the chamber a rising vote, with some 243 Representatives being present (R. 125, 238, 271). Bullets fired from the pistols of petitioners struck Representatives Jensen (R. 271-274, 331-332), Bentley (R. 524-526, 545-546), Davis (R. 192, 330), Fallon (R. 232-241, 537-538), and Roberts (R. 110, 538,542) who were then on the floor of the House Chamber. Other bullets narrowly missed Representatives Burdick (R. 168) and Graham (R. 205). Bullets were later found imbedded in a desk (R. 517, 753, 795), a chair (R. 795), in the walls of the southeast corner of the chamber (R. 795), in the gallery in the northeast corner of the chamber (R. 641, 725, 753, 795, 798), and in the ceiling (R. 517, 594). Although petitioner Cordero reloaded his pistol after having fired all the cartridges in the clip, he was prevented from further shooting by a spectator who grappled with him (R. 427-431). The outside doorkeeper had pushed down petitioner Lebron's hands, causing her to drop her pistol (R. 368). The spectator who disarmed Cordero seized petitioner Miranda as he emerged from the gallery and, with the help of Representative Van Zandt, disarmed him (R. 432, 249-252). Petitioner Rodriguez, who stated that his pistol jammed after firing three or four shots (R. 163-164, 1047-1048), was arrested at a bus station later (R. 589). Both Cordero and Rodriguez had extra cartridges for the pistols in their pockets at the time of the shooting (R. 589, 718).

After the shooting, petitioner Lebron was heard to say "We got 'em" and "I no sorry, I did it for my country * * *. We be back * * *. We come back" (R. 369, 675-676). In her purse was a note, which she identified during the trial as one she had written in the New York railroad station just before her trip to Washington, which stated:

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> * * * This is a cry for victory in our struggle for independence * * *. I state forever that the United States of America are betraying the sacred principles of mankind in their continuous subjugation of my country * * * and in their barbaric tortures to our apostle of independence Don Pedro Albizu Campos. (R. 508-509).

At the trial all the petitioners testified they were members of the Nationalist Party in Puerto Rico (R. 949-950, 1029, 1072-1073, 1144) and expressed sentiments similar to those contained in the note (R. 1014, 1073, 1121). Miranda claimed to be the leader of the group, and, like the other three petitioners, refused to implicate anyone other than his three "partners" (R. 1150, 1121, 1048).

Each petitioner testified that the group had met together in New York on Sunday, February 28, 1954, on the eve of their departure for Washington (R. 1042, 1095, 1135-1136) to discuss their plan, which "included everything that happened in the Capitol" (R. 1145, 1095). Each male petitioner then gave Lebron money to buy a one-way ticket to Washington and agreed to meet armed in the Pennsylvania station the following morning (R. 794, 973, 1137). It was agreed among them that they would go to the Capitol and fire their weapons at the members assembled there (R. 972-974, 1043). They also testified that they did not use blank cartridges because that would be beneath the dignity of revolutionaries (R. 1094).

All petitioners, except Lebron, testified that they pointed their weapons downward toward the floor of the House while firing them (R. 1026, 1101, 1124). Each testified that he knew beforehand that they might seriously injure or kill someone (R. 1106, 1146-1147, 1047). A witness, Congressman Burdick, testified that petitioner Lebron's shots seemed to hit the ceiling (R. 162, 170).

ARGUMENT

1. Questions 1, 3, 4, 5, and 6, as presented in the petition, all rest on the assumption that the sanity of petitioners was or should have been an issue in the trial of the case. That this assumption is false is clear from the record. Prior to the trial the petitioners, at the instance of the government, had been examined by three psychiatrists

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who found no evidence of mental disorder and who were of the opinion that petitioners were of sound mind (R. 1409-1416). The reports of the psychiatrists were turned over to the defense (R. 924-925). During argument for leave to investigate petitioners' background at government expense, the government invited the defense to request the appointment of other psychiatrists (R. 1399), but they never did. Following the argument on the motion, the court ruled that if the defense wished a judicial determination of petitioners' mental capacity to stand trial they should file a motion supported by affidavits (R. 1371-1372) in accordance with the procedure prescribed in 18 U.S.C. 4244. Though defense counsel then stated they would "prepare such a motion" (R. 1372), they never did. During the trial the chief defense counsel informed the court that he had no doubts about the mental condition of the petitioners (R. 929). Petitioners themselves steadfastly and continuously refused to put their sanity in issue (Pet. 19-20).

a. In the light of these facts the trial court was quite correct when it denied petitioners' pre-trial motion "for an order authorizing their counsel, or any of them, to proceed with the investigation at their prior habitats in New York and Puerto Rico" at government expense (R. 1371, 1395). This investigation was sought by petitioners' counsel "for the purpose of determining whether insanity (irresistible impulse) was an available defense" (Pet. 5). The court below correctly observed that there was "no authority for such a fishing expedition." Even assuming the doubtful proposition that funds could be made available to defense counsel for the purpose of an investigation, it is clear that, for such relief, there would have to be a much stronger and more direct showing of necessity than was made here.

b. At the close of the defendant's evidence, an associate defense counsel made the following statement (R. 1159-1160):

> If your Honor please, at this time it has occurred to us as counsel for these people, for these defendants, there is probably something mentally wrong with them.
>
> We are asking the Court at this time to have these people examined by psychiatrists

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> other than those who Mr. Rover [the United States Attorney] had examine them. Because of the conversation, the testimony on the witness stand, and what the testimony was, their lack of remorse, their peculiar attitude toward this entire situation, that I am firmly convinced there is a strong probability that these people are mentally unstable.

As the court below held, this cannot be construed, as petitioners would now have it construed (Pet. 24-27), as a proper motion for mental examination under 18 U.S.C. 4244. Such a motion must be made in good faith and on reasonable grounds. Wear v. United States, 218 F. 2d 24 (C.A. D.C.). Here the oral statement that "it has occurred to us * * * there is probably something mentally wrong" with the accused adduces as reasons for the conjecture that they were "mentally unstable" only their demeanor on the witness stand and lack of remorse. This was not sufficient to constitute an adequate showing under 18 U.S.C. 4244 in the face of the earlier psychiatric examinations, the deliberate failure of the defense to take advantage of the pre-trial opportunities proferred them to have petitioners mental competence examined and judged, and the assurance of chief defense counsel that he considered petitioners competent.

c. No evidence was adduced at the trial from either the lay witnesses or the petitioners which was sufficient to rebut the presumption of sanity of the accused and shift the burden of proving their sanity to the government. Petitioners, relying on the rule (See Tatum v. United States, 190 F. 2d 612 (C.A. D.C.)) that once some evidence of mental disorder is introduced to rebut the presumption of sanity the burden of proving sanity shifts to the government, urge that "in the instant case the act itself was sufficient in its very nature to have constituted 'some evidence'" of insanity (Pet. 27). The mere statement of this contention is its best rebuttal. Under petitioners' view all heinous crimes become symptoms of insanity; to prove that an accused did the act charged would in itself be sufficient to require that the prosecution proceed with proof of mental competency.

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d. Petitioners also urge that they were denied due process of law and a fair and impartial trial by reason of the court's refusal to allow direct examination of petitioners concerning the nature of their relationship with the Nationalist Movement in Puerto Rico and their background and emotions before and at the time of the offense. They contend that such refusal eliminated insanity in the form of "irresistible impulse" as a defense (Pet. 3-4). But no case has been discovered, nor have petitioners cited any, wherein the defense of irresistible impulse was ever submitted to a jury in the face of the accused's repudiation of the defense in their own testimony from the witness stand. As the petition states, petitioners refused to rely on the defense of insanity in any form (Pet 19, 20). Interrogation of the petitioners as to their relationship with the Nationalist Movement in Puerto Rico and as to their background and emotions could not possibly have established that petitioners, in committing the assaults, acted under an irresistible impulse in the face of their own testimony that the assaults were planned in New York (R. 1145-1147) and carried out in Washington as planned (R. 369, 675-676, 1093-1094).

Similarly, there is no foundation for petitioners' contention that they were denied due process of law by the failure of the trial court, on their motion for a new trial made prior to imposition of sentence, to consider the change in the law governing insanity made by the Court of Appeals in Durham v United States, 214 F. 2d 862 (C.A. D.C.). The Durham decision, concerned as it was with questions of insanity, has no relevancy to this case, where the sanity of petitioners was never an issue.

2. It was not error for the trial court, at the close of the government's case, to refuse to consider a defense motion to withdraw a juror and declare a mistrial on the ground that petitioners should have had separate counsel.

At the time one of the appointed counsel made the motion for withdrawal of a juror (R. 919), the chief defense counsel stated to the court (R. 920):

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> I think I should say this, if your Honor please: On at least two occasions we have discussed very carefully with each defendant, with the non-English speaking defendants through an interpreter, the question as to whether in the minds of any one of them there was any conflict of interest or difference of point of view, advising them that if it were so, I would suggest that we divide ourselves and one represent each of the four.
>
> On all or on each of two occasions they insisted that there was neither a conflict of interest, division of opinion, and that what they did they did jointly and they wanted to be defended by the four of us.

The associate counsel who had made the motion then observed (R. 920):

> There is no disagreement between counsel, I am merely making the motion for the record, if your Honor please.

In view of the unanimity among defense counsel during the trial that there was no conflict of interests among petitioners requiring separate representation, and the complete understanding of petitioners and their counsel that the defense should be conducted by joint representation, the point now raised seems frivolous. The Sixth Amendment guarantee of effective assistance of counsel grants the right to separate representation only when the interests of the several defendants conflict. Glasser v. United States, 315 U.S. 60, 76; Danziger v. United States, 161 F. 2d 299 (C.A. 9).

3. Petitioners, in asserting that it was reversible error for the trial court to exclude all questions directed to the motives of the accused,*/ argue, in substance, that since the prosecution may show motive to prove the criminal intent to kill, the accused should also be allowed to show their motive in doing the act charged. In Collazo v. United States, 196 F. 2d 573 (C.A. D.C.), certiorari denied, 343 U.S. 968, the court clearly marked out the limits the law imposes on such use of evidence of motive when it states:

> * * * If the fact of killing by an accused is in issue * * * the prosecutor is permitted * * * to prove that the accused had a motive * * *. Likewise, in such a case, the accused

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*/ This contention is made only on behalf of the three male petitioners inasmuch as Lolita Lebron, the female petitioner, was acquitted of the charges of assault with intent to kill.

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> * * * is permitted to prove that he had no motive, no reason, for killing the deceased. * * * But, if a killing is purposed (intended) and none of the established legal excuses for purposed killing is pleaded, the motive of the killer is wholly immaterial. The courts frequently point out that not even the highest motive, outside the well-recognized legal justifications, is a defense to purposed killing.

Since the petitioners had testified that they did intend to kill some members of Congress when they fired onto the floor of the House (R. 1047-1048, 1106, 1123-1124) their motive, however high or patriotic they might think it to be, was immaterial.

4. Petitioners contend (Pet. 35-37) that assault with intent to kill includes as a lesser offense assault with a dangerous weapon and that, since they could not properly be convicted of both offenses, it was improper to submit all counts to the jury. Since, however, under Rule 31(c), F. R. Crim. P., a defendant "may be found guilty of an offense necessarily included in the offense charged", the counts would not, in any case, have had to be withdrawn from the jury. Accepting petitioners' analysis of the crimes, the result would be only that they could not be separately sentenced for the same assault. They were not separately sentenced here.

Moreover, this case does not actually involve "included" offenses since each of those charged contains a totally different essential element. Burcham v. United States, 163 F. 2d 761 (C.A. D.C.); see Gavieres v. United States, 220 U.S. 338, 342. Because the distinguishing element of assault with intent to kill is the specific intent which must be proved, it is immaterial whether the means or instrument employed is dangerous or not. Davis v. United States, 16 App. D.C. 442 (C.A. D.C.); United States v. Barber, 9 Mackey 79, 84 (Sup. Ct. D.C. 1891). In assaults with a dangerous weapon, on the other hand, the nature of the instrument as a "dangerous" one must be proved. Davis v. United States, supra. Because the dangerous weapon used in the commission of one crime may have a bearing on the specific intent required for the commission of the other crime, it is proper to charge each in separate counts and obtain verdicts on each count. Separate verdicts are not only more

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precise, but are consistent and in keeping with the statutory scheme. See Grock v. United States, 289 Fed. 544 (C.A. D.C.).

5. Petitioners also contend that the trial court denied them a fair trial both in the instructions it gave and in those it refused to give to the jury.

a. In attacking the instructions on the ground they were confusing, petitioners point to the court's reference to a "preconceived plan" and "acting in concert" as appropriate only to a criminal conspiracy (Pet. 37). Evidence had been adduced at the trial that petitioners had met in New York to plan their trip to Washington and their demonstration in the Capitol (R. 978, 1042, 1095, 1135, 1136, 1145). It was also established that they acted in unison when they rose in the gallery of the House and began their assault (R. 72, 204, 947). Such evidence established not only their criminal intent but also the fact that they acted as principals, each in his own right, and as aiders and abettors to each other. In view of this evidence, it was entirely proper for the court to refer to the "pre-conceived plan" and to their "acting in concert" in its instructions.

b. Their argument that the instructions erroneously stated the applicable law of aiding and abetting rests upon the assumption that the petitioners could not at one and the same time have been principals as to one assault and aiders and abettors to other assaults (Pet. 41). Otherwise stated, the argument is that the jury could properly have found each defendant guilty of no more than one assault (Pet. 42) despite the fact that there were five different victims of the assaults. The fallacy of the argument is revealed in the concession that all the defendants would be guilty of assaults had only one done the act while the others, joining in the intent, had stood by and watched (Pet. 42). Since there were four defendants each actively engaged in the commission of an assault, each acting in concert to carry out their intended plan, there is no reason in law or logic why each cannot be charged as a principal for the assaults he committed and as

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an aider and abettor for the assaults his fellow assailants committed. In a situation such as this, where all the assaults were within the intendment of their joint enterprise, where each of the defendants participated actively in carrying out the plan, the jury could find all four defendants guilty of each assault. Borum v. United States, 284 U.S. 596.

Petitioners argue (Pet. 42-43) that, in its main charge, the court did not give adequate instructions on the intent necessary to constitute aiding and abetting. They assert that the correct principles were stated as to petitioner Lola Lebron, after the male petitioners had already been convicted, when the court said (R. 1313-1314):

> * * * a person who aids and abets can be found guilty of an assault with intent to kill, provided the person aiding and abetting either had the intent herself or else knew the other defendants whom she was aiding and abetting had that intent.

But in his main charge, the judge had said (R. 1267-1268):

> * * * to find a person guilty on the principle or the ground that he was an aider and abettor, it must be proved that he shared in the criminal intent of the principal and joined in the unlawful purpose at the time the act was committed.

The charge conceded to be correct and the main charge are not essentially different. The difference in the jury verdict, to which petitioners refer, manifestly arises, not from the charge, but from the evidence, which was to the effect that the men admittedly pointed their weapons to the floor where the Congressmen were, whereas there was evidence that Lolita Lebron shot toward the ceiling (R. 1026, 1101, 1124, 162, 170).

c. Petitioners further urge (Pet. 38-40) that the court eliminated from the jury's deliberation any consideration of the element of criminal intent when it stated (R. 1269):

> To discharge a firearm into a group of people constitutes an assault even though there is no specific intent to hit any particular person within the group.

When the above statement is read in the context of the entire instruction, it is clearly correct. It was designed to explain to the jury that a

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defendant could be guilty of an assault if his criminal intent was directed toward a group or a class and that it need not be directed toward any particular individual in the group. The intent, when directed at a group, carries over and applies to any member of the group who suffers the assault. Collazo v. United States, 196 F. 2d 573 (C.A. D.C.), certiorari denied, 343 U.S. 968; Harrison v. State, 19 Ala. 29. That the trial court did not take from the jury the existence of intent is shown by its precise instructions (R. 1286-1287) that:

> . . . Intent is a state of mind. In other words, did the person who fired into a group of people have any intention of killing someone? Whether he did or not is something for you to determine * * * it is for you to decide from the act and from the surrounding circumstances whether there was an intent to kill.

Among the circumstances thus left to the jury's consideration was the affirmative testimony of petitioners which disclaimed that their assaults were the result of accident or inadvertence.

6. There is no merit to petitioners' argument that the trial court erred in accepting partial verdicts from the jury during the course of its deliberations. The record reveals that the jury foreman, just before the dinner recess, informed the court that the jury had "reached a verdict on * * * fifty percent of the indictments and were making progress on the other counts" (R. 1295). Though the chief defense counsel, when first asked by the court if there was any objection to taking a partial verdict, answered "I don't think it makes any difference" (R. 1296), he later joined the other defense counsel in objecting to partial verdicts on the ground "that it will deprive the defendants of the value of * * * compromise with respect to the remaining counts (R. 1297). The court did, however, receive a verdict of guilty as to all petitioners on the last five counts, which charged assault with a dangerous weapon (R. 1298). Shortly thereafter, the court told the jury (R. 1303):

> I think you can still further concentrate and simplify your labor by doing this when you return: Take up each defendant separately as to the first five counts * * * and if you agree upon any one

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> defendant, * * * you can come in and bring in the verdict as to that defendant and then go back and deliberate as to any of the others.

After dinner, at 7:30 p.m. the jury resumed deliberations. At 11:20 p.m. they returned to court and announced a verdict of guilty as to the three male petitioners on the first five counts charging assault with intent to kill (R. 1304). Later they returned a verdict acquitting the female petitioner on the same first five counts (R. 1320).

The rule of the District of Columbia on this matter is set forth in Clainos v. United States, 163 F. 2d 953 (C.A. D.C.):

> Permitting a jury to return its verdict on some counts of an indictment before it has reached a verdict on other counts is not erroneous in the absence of affirmative indication that the rights of the appellants were affected.

Though petitioners urge that the statements of the court and its acceptance of partial verdicts affected their rights in that they "effectively coerced an unfavorable verdict and deprived the accused of due process of law by limiting the area for compromise and adjustment of natural differences of opinion among the jurors" (Pet. 45), they do not indicate how this was caused. In fact, the distinction drawn by the jury between the male and female petitioners indicates careful consideration of each charge.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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